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No. 00-1790

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the language in this Court's opinion in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) providing that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the *prescribed statutory maximum*" refers to the maximum sentence prescribed under the United States Sentencing Guidelines, because as this Court explained in ***United States v. R.L.C.,*** 503 U.S. 291 (1992), the Sentencing Guidelines are statutes?

II. Whether the Eleventh Circuit's opinion in the instant case regarding the enhancement of the Petitioner's sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) and/or ***Jones v. United States,*** 526 U.S. 277 (1999), where: ***(A)*** the offenses charged in the Indictment did not charge *Diaz* with an offense involving five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841, ***(B)*** the trial court did not instruct the jury to determine the quantity of cocaine, and ***(C)*** *Oscar Diaz'* sentence was enhanced from a minimum of ten (10) years to twenty (20) years based upon the trial court's

factual finding that the quantity of drugs attributable to *Diaz* was five (5) kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A), even through that statute was not charged in the Indictment?

III. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment after application of the United States Sentencing Guidelines, may be increased from 10 years to 20 years based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

IV. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth

Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's minimum punishment under the penalty provisions of the charging statute, may be increased from a range of zero to 20 years to a range of 20 years to life imprisonment, based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant, who has a prior felony drug conviction, had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

V. Whether a trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) and/or ***Jones v. United States,*** 526 U.S. 277 (1999), to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

VI. Whether the proper standard of review is *per se* reversible error where an Indictment that fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due

Process rights and Sixth Amendment guarantees of notice and jury trial?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-1790

OSCAR DIAZ,
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v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF OF THE UNITED STATES

Oscar Diaz, Defendant and Appellant in the courts below, respectfully replies to the Brief of the United States as follows:

ARGUMENT I

THE LANGUAGE IN THIS COURT'S OPINION IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000) PROVIDING THAT "ANY FACT [OTHER THAN A PRIOR CONVICTION] THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE *PRESCRIBED STATUTORY MAXIMUM*" REFERS TO THE MAXIMUM SENTENCE PRESCRIBED UNDER THE UNITED STATES SENTENCING GUIDELINES, BECAUSE AS THIS COURT EXPLAINED IN *UNITED STATES V. R.L.C.*, 503 U.S. 291 (1992), THE GUIDELINES ARE STATUTES.

A. The U.S. Sentencing Guidelines are Statutes and a Defendant's Sentence May not Exceed the Lowest Maximum Sentence after Application of the Guidelines and Limitations on Sentences Set Forth in the Charging Statutes.

The Government argues that this Court's ruling in *Mistretta v. United States*, 109 S.Ct. 647 (1989), precludes applying *Apprendi* to the case at bar. Govt.R.p. 5. However, the Government's application of *Mistretta* is misplaced. The "use and operation" of the Guidelines is not threatened by the mandates of *Apprendi*. Nor is the use of a properly instructed jury to reach quantative threshold determinations, beyond reasonable doubt and based upon the evidence presented, inapposite to the holdings and expectations of *Mistretta*. Indeed, as the "guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various

specified factors, 'among others'" [See, ***Mistretta v. U.S.***, 109 S.Ct. 647, at 653], Courts will now be able to apply a wide range of sentences judiciously after the trier of fact has been established by a jury and proven beyond reasonable doubt. The prescribed goals of the United States Sentencing Guidelines can be met by applying the principle of jury determination of facts as directed by ***Apprendi***.[1]

The Petitioner was subjected to increased punishment based on the existence of facts not stated in the indictment, nor instructed to the jury, and not found by the jury beyond a reasonable doubt. As Justice Stevens stated in the lead opinion in ***Apprendi***, it "is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribe range of penalties to which a criminal defendant is exposed." 120 S.Ct., at 2363 (quoting ***Jones v. United States***, 526 U.S. 227, 252, 119 S.Ct. 1215, 1228 (1999)(Stevens, J., concurring). Specifically, inasmuch as the constitutional rule announced

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[1]Congress charged the Commission with three goals: "to assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records...while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and "to reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." ***Mistretta*** at 656, citing **28 U.S.C. § 991(b)(1).**

in ***Apprendi*** relied upon ***Jones***[2], and the sentence in ***Jones*** was struck down – even though it did not exceed the statutory maximum – the rule of ***Apprendi*** is not limited to those instances in which the increased penalty provisions exceed the statutory maximum of the charging statute. *E.g.*, ***United States v. R.L.C.***, 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d. 559 (1992)(the Court rejected the Government's attempt to argue that an "authorized" sentence refers only to the penalty provisions in the charging statute, rather than limitations imposed through the Sentencing Guidelines). As a result, this Court's holding in ***Apprendi***, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," applies to the statutory maximums set forth in the United States Sentencing Guidelines if such are lower than the maximums set forth in the charging statute. 120 S.Ct. at 2362-63 (emphasis added).

Therefore, each fact that increases a defendant's

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[2]The ***Apprendi*** Court explicitly adopted as its holding "the opinion that we expressed in ***Jones*** [***v. United States***, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d. 311(1999)]." *Id.* at 490, 120 S.Ct. 2348. In ***Jones***, a case involving a federal prosecution, the Court stated that the Fifth and Sixth Amendments require that "any fact (other than a prior conviction) that increases the maximum penalty for a crime, ***must be charged in the indictment***, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n. 6, 119 S.Ct. 1215 (emphasis added)

sentencing range, must be submitted to a jury and determined beyond a reasonable doubt. See, ***Apprendi,*** 120 S.Ct. at 2367 (Scalia, J., concurring),("all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury") and ***Jones***, *Id.* at 243, n. 6, 119 S.Ct. 1215.

Additionally, due process and the constitutional right to a trial by jury demand that facts that substantially increase the "legally prescribed punishment" be found by a jury and established beyond a reasonable doubt. Therefore, in light of ***Apprendi***, it is disingenuous for the Government to argue in sum that, on the one hand, any U.S.C. statute that has, for example, a maximum sentence exposure of 10 years must have all the elements of the offense charged in the indictment, submitted to a jury and proven beyond a reasonable doubt before the defendant in such a case can be sentenced beyond the statutory range – while concomitantly arguing that such constitutional protections do *not* apply in a Guideline sentencing scheme in which a defendant may have an exposure of 20 years imprisonment or, in the extreme, life imprisonment. (Govt.Resp. P. 6-9). In fact, this Court has rejected the argument that the "maximum penalty authorized under the statute" refers to the charging – not the maximum under the Sentencing Guidelines–as follows:

> The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory. See 18 U.S.C. § 3553(b). More

significantly, the Government's argument that "authorization" refers only to what is affirmatively provided by the penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate, seems to us to beg the question. Of course it is true that no penalty would be "authorized" without a statute providing specifically for the penal consequences of defined criminal activity. The question, however, is whether Congress intended the courts to treat the upper limits of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit, and an unwarranted departure [503 U.S 298] from the proper Guideline range would be reversible error. 18 U.S.C. § 3742. Here it suffices to say that the Government's construction is by no means plain. **The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.** This, indeed, is arguably the more natural construction.

R.L.C., U.S., 298, 112 S.Ct., 1334. ***Mistretta v. United States***, 488 U.S. 361, 109 S.Ct., 647, 102 L.Ed.2d. 714 (1989). See, Pet. Brief for Cert., p. 21-22.

ARGUMENT II

BEFORE INCREASING A DEFENDANT'S STATUTORY MAXIMUM SENTENCE ON THE BASIS OF THE QUANTITY OF ILLEGAL DRUGS A DEFENDANT EITHER CONSTRUCTIVELY POSSESSED AND/OR CONSPIRED TO POSSESS WITH INTENT TO DISTRIBUTE, THE PROSECUTION MUST PROVE BEYOND A REASONABLE THE QUANTITY OF ILLEGAL DRUGS BEYOND A REASONABLE DOUBT TO A JURY.

A. UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE NOTICE AND JURY TRIAL GUARANTEES OF THE SIXTH AMENDMENT, ANY FACT [Other Than Recidivism) THAT INCREASES THE MAXIMUM PENALTY FOR A CRIME MUST BE CHARGED IN THE INDICTMENT, SUBMITTED TO A JURY AND PROVEN BEYOND REASONABLE DOUBT.

(1) The Quantity of Drugs That a Defendant Intended to Possess and/or Conspired to Distribute is an Essential Element of 21 U.S.C. §§ 841(a)(1) and 846.

Respondent cites to several Appellate courts

that, since ***Apprendi***, have declined to disturb sentences imposed under Section 841(b)'s mandatory minimum sentencing provisions, where the district court made findings under preponderance of the evidence standard that triggered a mandatory minimum sentence, but the sentence imposed did not exceed the maximum authorized by the charging statute. Govt. Resp., p. 8-9. Respondent avers that this Court's holding in ***McMillan v. Pennsylvania,*** 477 U.S. 79 (1986)[3] was not disturbed by ***Apprendi.***[4]

Respondent then argues that every regional court of appeals has rejected the argument that

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[3] In ***McMillan***, this Court upheld a State minimum mandatory sentencing scheme whereby a judge would determine the imposition the mandatory sentence by preponderance of the evidence.

[4] In ***Apprendi***, while not expressly overruling its prior decision in ***McMillan***, this Court limited ***McMillan*** to cases that did not involve the imposition of sentences more severe than the statutory maximum for the offense established by the jury's verdict. See ***Apprendi***, 120 S.Ct. at 2361, n. 13. More significantly, in ***Apprendi*** this Court did acknowledge "constitutional limits exist to State's authority to define away facts necessary to constitute a criminal offense," *Id.* at 467, citing ***In Re Winship*** 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d. 368, and that "a State's scheme that keeps from the jury facts **exposing defendants to greater or *additional* punishment may raise constitutional concerns."** ***Apprendi.*** at 2350, citing **McMillan** at 85-88. (Emphasis added).

Apprendi applies to findings that simply help determine what sentencing range is applicable under the Guidelines. Govt. Resp. p. 7. However, the Ninth Circuit has held that ***Apprendi*** rendered the sentencing sections of Title 21 U.S.C. § 841(b) unconstitutional. Specifically, the Ninth Circuit examined Title 21 U.S.C.§ 841(b) in light of the "relevant inquiry" this Court set forth in ***Apprendi***, to wit: according to the effect of the statute, rather than its form, to determine whether it exposes a defendant to a greater punishment than authorized by the jury's guilty verdict. ***United States v. Buckland***, 259 F3d 1157, 2001 WL 893440, *Reh'g en banc* granted 2001 WL 1091167 (9th Cir., Aug. 9, 2001). Based upon this analysis, the Ninth Circuit held that Section 841(b)(1)(A) and (b)(1)(B) were unconstitutional. *Id.* See also, ***United States v. Hitchcock***, -F.3d-, 2001 W.L. 951273 (9th Cir., Aug. 23, 2001).

The analysis the Ninth Circuit applied in ***Buckland*** and ***Hitchcock*** is equally applicable here, where the District Court determined by a preponderance of the evidence that over 5 kilograms of cocaine were attributable to *Oscar Diaz*, and because *Mr. Diaz* had one prior drug felony conviction, under 21 U.S.C. §841(b)(1)(A), a 20 year sentence was *mandatory*, even though it was merely the maximum sentence applicable under 21 U.S.C. §841(b)(1)(C)–where the minimum sentence is zero.

Moreover, Petitioner was subjected to the enhanced penalty provisions of § 841(b) without any notice by either citing to the statute or specifying the amount of cocaine that the grand jury found *Diaz* possessed or conspired to possess. For the reasons asserted herein, these enhancements--uncharged and not submitted to the jury to be proved beyond a reasonable doubt–have deprived Petitioner of his substantial rights and rendered the outcome of his trial proceedings inherently unconstitutional.

Significantly, although various circuit courts have said that ***Apprendi*** does not apply where a judge has increased the range of punishment based on the judge's own findings by a preponderance of the evidence, (provided the sentence imposed does not exceed the maximum that Congress fixed by statute for the crime, in some cases life[5]), if those decisions accurately state what the ***Apprendi*** opinion means, then the opinion is a dead letter in most substantial narcotics cases. There is no greater sentence than, for example, life imprisonment for a defendant dealing in five kilograms of cocaine or one kilogram of heroin. A fair reading of ***Apprendi*** would see such an outcome as a violation of the respective defendant's

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[5] See, e.g., ***United States v. Meshack*** 225 F3d 556, 576 (5th Cir. 2000); ***United States v. Garcia,*** 240 F.3d 180, 183 (2nd Cir. 2001); ***United States v. Breen,*** 243 F.3d 591, 599 (2nd Cir. 2001).

(as in the case at bar) constitutional right for the jury to determine all elements by a beyond reasonable doubt standard.

Moreover, since this Court handed down ***Apprendi***, it has granted certiorari in some **forty** cases, twenty six of which are federal drug cases in which the circuit courts approved Guideline sentence increases based not on jury verdicts but on a judge's findings by a preponderance of the evidence. This Court vacated the circuit court judgments, and remanded for further consideration in light of ***Apprendi***. This Court's remands indicate clearly that the reasoning of the ***Apprendi*** decision is not to be restricted to instances where the sentence enhancement will cause a sentence to exceed the statutory maximum. In many of the drug cases remanded, the judges imposed sentences that did not exceed the maximum fixed in the statute. A representative sample of the 26 cases remanded includes cases where the quantity of drugs, the defendant's managerial role in a conspiracy, or possession of a firearm were "sentencing factors" found by a judge merely by a preponderance of the evidence.[6]

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[6] See, *e.g.*, ***United States v. Thomas***, 204 F.3d 381 (2nd Cir. 2000), *cert. granted*, –U.S.–121 S.Ct. 756, 148 L.Ed.2d 659 (2001); ***United States v. Harbin***, 209 F.3d 652 (7th Cir. 2000), *cert. granted*,–U.S.–, 121 S.Ct. 1071, 148 L.Ed.2d 948

Apprendi arose when the New Jersey trial court *enhanced* a defendant based upon a *preponderance of the evidence* for a violation of the State's hate crime law. The enhancement in the New Jersey "hate crime" statute is comparable to the Federal Sentencing Guidelines for threatening or harassing communications (Guideline 2A.6.1) and for threatening to assault with a firearm (Guideline 2A.2.2). Like the district judge following the Guidelines enhancements, the trial judge in New Jersey could increase the sentence based on the judge's own findings by a preponderance of the evidence. In both the State case of ***Apprendi*** and the federal drug cases (as in the case at bar), defendant is deprived of the right to due process of law and the right to a speedy and public trial by an impartial jury. The deprivation is the same in the state cases as it is in the federal cases even though deprivation is accomplished by a statute in state cases and in the federal cases by "Guidelines" which are binding law.

(2001); ***United States v. Valencia,*** 222 F.3d 1173 (9th Cir. 2000), *cert. granted,*–U.S.–, 121 S.Ct. 1222, 149 L.Ed.2d 133 (2001); ***United States v. Brown***, 217 F.3d 247 (5th Cir. 2000), *cert. granted,*–U.S.–, 121 S.Ct. 1072, 148 L.Ed.2d 950 (2001); ***United States v. Jackson***, 213 F.3d 1269 (10th Cir. 2000), *cert. granted,*–U.S.–, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000); ***United States v. Hester***, 199 F.3d 1287 (11th Cir. 2000), *cert. granted,* 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000).

See Argument I, *Supra.*

The fact that a separate State statute causes eventual sentence for an underlying crime to exceed the maximum penalty for that crime has no bearing on the comparable deprivation of the Constitutional rights of the defendants in both the federal and state cases. A defendant's Constitutional rights would not be so violated by a sentencing guidelines system in which all facts exposing the defendant to a particular sentencing range must be included in the indictment and found by a jury to have been proven beyond a reasonable doubt. While such a system may initially prove somewhat inconvenient, compromises for the sake of convenience should not be made at the expense of depriving Petitioner of his rights guaranteed by the United States Constitution.

(2) The Failure of an Indictment to Charge an Essential Element of an Offense, Requires Reversal of a Conviction.

The Government posits that generally only "structural" errors are subject to automatic reversal and then only in a "very limited class of cases." Citing ***Neder v. United States***, 527 U.S. 1, 8 (1999)(quoting ***Johnson,*** 520 U.S. at 468). Govt. Resp., p. 12-13. However, the cases cited by the Government all turn (in part) on the "overwhelming" evidence against the respective defendants. See *Id.* at 2. ("The evidence

was so *overwhelming* that [defendant] did not even contest [the materiality] issue." (Emphasis added); ***United States v. Nance*** 236 F.3D 820 (7th Cir. 2000), ("...there is simply no way on this record that [the jury] could have failed to find that [defendant] was conspiring to distribute 5 grams or more of crack cocaine."). A constructive error is harmless if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the errors" such as when the quantity of drugs attributable to a defendant is undisputed. ***United States v. Nealy*** 232 F.3d 825, 830 (11th Cir. 2000). Thus, the harmless error standard is only appropriate for small errors or defects that have little, if any, likelihood of having changed the result of the trial. ***Neder*** at 1838, 1839 (quoting ***Chapman v California,*** 386 U.S. 18, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

In contrast, the evidence regarding the quantity of drugs attributable to *Mr. Diaz* was hotly disputed - as was the evidence of his knowing participation.. After *Diaz* was detained, the ensuing search of his person yielded <u>no</u> money, <u>no</u> drugs, and <u>no</u> beepers or cell phones. (R6-37)(Pet. Brief, p. 15-16). Further, no evidence showed that *Diaz'* had cocaine residue on his hands or clothing, (R6-85-86, 116)(Pet. Brief, p. 16), and no evidence showed that *Mr. Diaz'* fingerprints were on any of the drugs or drug paraphernalia, (R6-116)(Pet. Brief, p. 16). A search of the apartment (which was rented by co-defendant Barreto) yielded

no guns, money or drug ledgers. (R6-103-04, 200-01).

Moreover, no testimony or evidence showed that *Oscar Diaz* saw or knew there was drugs in the duffel bag that Chavarry placed in a Chevy Blazer, or that the duffel bag was loaded with the drugs in *Diaz'* presence, or that the duffel bag came from the apartment, since no officer surveilled Chavarry exit from Barreto's apartment with the bag in his hand.

Additionally, no testimony or evidence indicated that *Diaz* discussed any numbers or quantities of monies, drugs or other objects, touched any cocaine packaging, paraphernalia or money, had any money that would indicate that he had just been involved or would be involved in any cocaine trafficking offenses, or that his fingerprints were present anywhere in the apartment where any cocaine was stored.

Significantly, even the District Court Judge during the argument on post conviction motions commented: *"[n]ow, I have said it before and I'll say it again that this case is a close case.* (R10-34). Clearly, viewing the evidence in the light most favorable to the Government, there was substantially less than "overwhelming" evidence against Petitioner. Such an error resulting in a dramatic increase in Petitioner's sentencing exposure based on facts not submitted to a jury and proved beyond a reasonable doubt has so "seriously affect[ed] the fairness,

integrity or public reputation of the judicial proceedings" herein, (***United States v. Olano***, 507 U.S. 725, 736 [1993]) that such error constitutes a "structural defect" of serious magnitude requiring reversal and remand. Therefore, in the interest of justice and adherence to the principles of the United States Constitution, such an error can never be "harmless." Accordingly, *Oscar Diaz'* judgment and sentence must be reversed. ("[S]entence must be reversed if the record contains evidence that could rationally lead to a contrary finding with respect to drug quantity.") See ***Neder*** 119 S.Ct. at 1837.

Moreover, the failure of the indictment to allege the drug quantity or specific penalty provision deprived the District Court of jurisdiction to sentence Petitioner. As a result, the trial court lacked jurisdiction to impose any sentence. *See e.g.*, ***United States v. Longoria***, 259 F3d 363 (5th Cir. 2001)(failure of indictment to charge a drug quantity and specific reference to 21 U.S.C § 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration), *rehr,g en banc granted*,–F.3d–, 2001 WL 946413 (5th Cir., Aug. 15, 2001).

Inasmuch as the lack of jurisdiction may be

raised at any time,[7] this issue was timely raised, and requires reversal of the conviction and sentence imposed herein. *See* ***United States v. Gonzalez***, 259 F.3d 355, 359 (5th cir. 2001), *reh'g en banc granted* (5th Cir. 2001)(explained that because of the jurisdictional "nature" of the error, evidence of the drug quantity at trial or the defendant's acknowledgment of the quantity was irrelevant and could not cure the grand jury's lack of notice of the quantity element (which was an element only because it was used to enhance the sentence). *See id.* at 360, n. 3.

Accordingly, where an indictment does not allege a drug quantity, the evidence adduced at trial supporting the trial court's finding of the drug quantity is "not relevant" and may not be used to enhance a defendant's sentence beyond what is

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[7] In ***Apprendi***, this Court did not address the indictment issue because the Presentment Clause of the Fifth Amendment has not been made applicable to states via the Fourteenth Amendment. *See* ***Apprendi*** at 477, n. 3, 120 S.Ct. 2348. However, in ***Apprendi***, this Court contrasted the state prosecution before it with the federal prosecution challenged in ***Almendarez-Torres v. United States***, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *See* ***Apprendi***, 530 U.S. at 477, n. 3, 120 S.Ct. 2348. In ***Almendarez-Torres***, this Court stated that *if* U.S.C. §1326(b)(2) "constitute[d] a separate crime, then the Government must write an indictment that mentions the additional element." *See* 523 U.S. at 226, 118 S.Ct. 1219.

charged in the indictment. *Id.* Thus, the lower courts' use of the drug quantities adduced at trial in affirming the sentence imposed, directly conflicts with the Fifth Circuit's opinion in ***Gonzalez***.

Finally, where the grand jury did not indict the Petitioner as to all elements of the enhanced offense such as Title 21 U.S.C. §841(b)(1)(A), the grand jury's omission of an element is a jurisdictional defect, resulting in reversible error *per se* without proof of prejudice. *See,* ***United States v. Alvarez,*** 735 F.2d 461, 468 (11th Cir. 1984)(present indictment cannot properly serve as the basis for sentences in excess of five years, where quantity element absent from indictment). [8] *See also,* ***Stirone v. United States***, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(deprivation of fight to be tried only on charges returned by grand jury "is far to serious to be treated...as harmless error"); ***United States v. Gayle,*** 967 F.2d 483, 485 (11th Cir. 1992)(*en banc*); ***United States v. Fern***, 155 F3d 1318, 1324-25 (11th Cir. 1998); ***United States v. Meacham,*** 626 F.2d 503, 510 (5th Cir. 1980)(objection that indictment fails to charge an offense is a non-waivable jurisdictional

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[8] Although ***Alvarez*** has not been followed by the lower court since ***United States v. Coy***, the court in ***United States v. Maslin***, F.Supp.2d-, 2000 WL 1294254 (N.D.N.Y. Sept. 14, 2000), held that after ***Apprendi***, "it appears that the validity of ...***Alvarez***...has been reinstated").

defect).

CONCLUSION

For all the foregoing reasons, therefore, *Oscar Diaz,* respectfully submits that this Court should grant his Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 8th day of October, 2001, to: ***Theodore B. Olson, Acting Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeline Shirley, Esq.,*** Assistant U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

RHONDA A. ANDERSON, ESQ.